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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

LINDBERGH KIRBY, PETITIONER,

versus

THE UNITED STATES, RESPONDENT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Lindbergh Kirby, plaintiff in Case Number 760-71 in the United States Court of Claims prays that the Supreme Court issue to said lower court writs of *certiorari* to review each of the judgment orders of the United States Court of Claims as follows:

A. The opinion, dated May 11, 1973, dismissing his petition to said court; and

B. The order, dated October 17, 1973, denying his motion for reconsideration of the decision in the opinion of May 11, 1973.

OPINION BELOW

On May 11, 1973, the lower court rendered an opinion in petitioner's claim styled *Lindbergh Kirby v. The United States,* number 760-71. That opinion, with two dissenting opinions, has not been officially reported but has been reported in a slip opinion which is copied *verbatim* at pages 6-24 of the Appendix.

An order, dated October 17, 1973, denying reconsideration is at pages 25-26 of the Appendix.

JURISDICTION

The judgment-orders of the United States Court of Claims sought to be reviewed were dated May 11, 1973. An order, dated October 17, 1973, denied petitioner Kirby's request for reconsideration of the decision of May 11, 1973.

On January 17, 1974, Mr. Chief Justice Burger signed an order extending the time for petitioner Kirby to file a petition for *certiorari* in the case to and including February 14, 1974.

Jurisdiction in the Supreme Court is invoked under 28 USC 1255.

QUESTIONS PRESENTED

A. Can the United States Court of Claims dismiss a petition for money judgment (filed within six (6) years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

B. Did the United States Court of Claims fail to exercise its jurisdictional functions in refusing to afford relief to the plaintiff, Kirby, under the provisions of 10 USC 1491, as amended?

C. Was the Court of Claims in error in narrowly interpreting the statute of limitations of six (6) years to include plaintiff's claim for retired pay because it applied to his claim for active duty pay?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory basis of petitioner's claim are cited below.

Their pertinent text are set forth in the Appendix attached hereto, pages 1 through 4.

UNITED STATES CONSTITUTION

Article I, Section 8
Article III, Sections 1 (1) & 2 (2)
10 USC 1552
28 USC 1491 (1973 pocket part)
28 USC 2501
10 USC 8811 (now 10 USC 1169)
10 USC 8914
Rule 37 Court of Claims

STATEMENT OF THE CASE

1. Petitioner was born on May 12, 1928. He enlisted in the U. S. Army on June 30th, 1946, and was assigned to the Army Air Force. When the Air Force separated from the Army, he became a regular member of the Air Force and served through four continuous six year enlistments except for a short interim of three and one-half months between enlistments. He last enlisted on June 10, 1961, for a six (6) year term in the grade of Master Sergeant (E7), the highest enlisted grade at that time. Had he been privileged to serve out his contract which would have expired on July 9, 1967, he would have been eligible to have voluntarily retried on July 10, 1967 as a Master Sergeant (E7) with twenty years, ten months, and seventeen days active duty.

2. On May 2, 1963, he was administratively, involuntarily discharged from the Air Force in his grade of Master Sergeant with an honorable discharge for unsuitability, under regulations pursuant to 10 USC 8811 (now 10 USC 1169).

3. Petitioner sought to have his discharge set aside and his records corrected by appealing to the Air Force Discharge Review Board and to the Air Force Board For Correction of Military Records, as permitted in 10 USC

1552, requesting that his discharge be set aside and/or his records be corrected by removing the "unsuitability" characterization of his discharge so that he would be eligible to re-enlist and complete his current six year enlistment contract which was in effect at the time of his discharge. The correction board arbitrarily refused him a hearing (although required to do so) and denied his request for relief by letter dated January 19, 1968.

4. By petition filed September 16, 1971, petitioner sued in the United States Court of Claims pursuant to 28 USC 1491 seeking to recover active duty pay and allowances from the date of his illegal discharge on May 2, 1963 to the date his enlistment contract of six years would have expired by operation of law, July 9, 1967, and for retired pay and allowances due him as a Master Sergeant with thirty years active service or in the alternate, with more than twenty years active service. The basis of plaintiff's claim in the Court of Claims was that his discharge was illegal because in violation of the rules and regulations promulgated by the Secretary of the Air Force pursuant to his authority under 10 USC 8811 (now 10 USC 1169) (App., p. 3).

5. Defendant United States pleaded the statute of limitations of six years as to petitioner's claim for active duty pay and allowances. Defendant did not plead the limitation statute as a defense to the claim for retirement pay and allowances, defending, instead on the ground that plaintiff's claim for retirement pay should be dismissed because his involuntary discharge was legally sufficient. In this pleading, defendant admitted plaintiff's claim was not barred by the statute of limitations (Rule 37, Court of Claims, App., p. 4).

6. The cause came on to be heard before the full Court of Claims on November 3rd, 1972 on cross-motions for

summary judgment. During the course of oral argument, plaintiff conceded that his money claim for active duty pay and allowances was filed too late because it was filed more than six years after the date of his discharge on May 2, 1963. Plaintiff contended however, that his claim for retired pay and allowances was not barred by the statute of limitations because his right to retire with twenty years active service accrued on July 9th or 10th, 1967, less than six years from the date his claim first accrued. At the same hearing, counsel for defendant, The United States, was asked by a court member why the defense did not plead the statute of limitations as a bar to plaintiff's claim for retired pay. Counsel's response was that the defense was of the opinion that the order in the case of *Rynerson v. United States,* No. 57-71 (App., pp. 5-6), dated November 11, 1971 holding that *Rynerson's* claim for retired pay, having been filed within six years of his right to retire, constituted authority that plaintiff's claim for retired pay and allowances was timely made.*

7. On completion of argument, the court directed both sides to file briefs on the points (1) was plaintiff's claim for retired pay and allowances barred by the statute of limitations (28 USC 2501) and (2) was it barred by laches.

8. In an opinion, dated May 11, 1973, with two of the seven justices strongly dissenting, the court held that plaintiff Kirby's claim for retired pay and allowances was barred by the limitations statute because it had not been filed within six (6) years from the date Kirby was ordered discharged in 1963 (App., pp. 6-24). By order, dated October 17, 1973, that court denied petitioner Kirby's request for reconsideration of the decision of May 11, 1973 (App., pp. 25-26).

* *Rynerson's* claim was subsequently dismissed on the grounds of *laches.* Thus his claim, like *Kirby's,* was not barred by the statute of limitations. *Rynerson v. U. S.,* 57-71, decided June 22, 1973.

REASONS FOR GRANTING THE WRITS

1. The Court of Claims has decided the following important question of federal law which has not been, but should be, settled by this court:

> Can the United States Court of Claims dismiss a petition for money filed within 6 years of accrual, as was petitioner's claim for retired pay because the plaintiff has failed to assert some narrower cause of action in some other court such as a request for declaratory judgment, mandamus, etc.?

2. The Court of Claims' decision in *Kirby v. The United States* is in conflict with its judgment order in *Rynerson v. The United States,* No. 57-71, dated November 11, 1973 (App., p. 5), and with the following prior decisions of the Court of Claims: *Hames v. United States,* 164 Ct. Cl. 746 (cert. denied), 377 U. S. 904 (1964); *Palmer v. United States,* 129 Ct. Cl. 322, 121 F. Supp. 643 (1954); Cf. *Cason v. United States,* 200 Ct. Cl. 424, 471 F. (2d) 1225 (1973); *Sauer v. United States,* 173 Ct. cl. 642, 354 F. (2d) 302 (1965).

3. The Court of Claims has decided federal questions in ways conflicting with the following decisions of this court:

> *Wehrman v. Conklin* (1894), 155 U. S. 314, 325, 326, 15 S. Ct. 129, 39 L. Ed. 167, holding that a pure claim for money filed within the statutory period of limitation may not be dismissed on that ground or for laches.
>
> *Taylor's Administrator v. U. S.* (1878), 14 Ct. Cl. 339, 353, affirmed in *U. S. v. Taylor* (Oct. 1881), 104 U. S. (14 Otto) 216, 26 L. Ed. 721, where the courts held that a claim against the government for money due under a statute which required the claimant to file an application with the executive branch, does not accrue until the application is filed with such branch. *U. S. v. Throckmorton* (Oct. 1878), 98 U. S. 61, 25 L.

Ed. 93, holding that plaintiff may not split his causes of action.

4. The Court of Claims has decided a federal question in this case not heretofore decided by this court when the Court of Claims refused to grant plaintiff Kirby's Motion for Reconsideration, dated May 30, 1973, asking the court to provide - - - "an entire remedy and to complete relief afforded by the judgment - - - by issuing orders directing restoration to office or position, placement in appropriate duty status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States - - - - " pursuant to the amendment of 29 August 1972 to 10 USC 1491 (86 Stat. 652).

ARGUMENT

Petitioner will not present a lengthly argument here, relying upon the authorities filed and in particular, on the reasoning and opinions of dissenting Judges Davis and Nichols in the decision of May 11, 1973 in plaintiff's case before the Court of Claims. In addition, petitioner is of the opinion that the Court of Claims arbitrarily refused to grant relief to plaintiff Kirby which was within its jurisdictional functions, in declining to grant any of the options afforded it under the 1972 amendment to 10 USC 1491.

Petitioner is satisfied that the reasons heretofore cited are sufficient to cause this court to grant the writs prayed.

In deference to the provisions of pragraph 3, Rule 23, no separate or supporting brief is being filed.

CONCLUSION

The United States Court of Claims misdecided a new and important question of federal law, decided federal questions in ways conflicting with its own and decisions of this court, and far departed from the accepted and usual course of judicial proceedings. These grounds for certiorari are summarized in Reasons for Granting the Writs.

These lower court errors involved the court's abuse of judicial power of retroactive judicial legislation and otherwise, thus enlarging technical and anomalous time-bars, and the court's non-use of its power to hear and decide the merits of a money claim against the United States based on statutes benefiting veterans, plus its refusal to apply additional relief to claimants granted it by recent acts of congress, are believed to require writs of certiorari.

Pursuant to Rule 23, paragraph 5, this court's attention is invited to the petition for writs of certiorari in the case of *Rynerson v. United States,* number 73-1084, docketed January 9, 1974.

Respectfully submitted,

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